

State Farm Insurance Companies



September 13, 2004

Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue NW
Washington, DC 20580

One State Farm Plaza
Bloomington, Illinois 61710-0001

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RE: "CAN-SPAM Act Rulemaking, Project R411008"

Dear Sir or Madam:

State Farm Mutual Automobile Insurance Company ("State Farm") and its affiliated companies are pleased to have the opportunity to submit these comments on proposed rulemaking by the Federal Trade Commission ("Commission") implementing the CAN-SPAM Act.

By way of background, State Farm Mutual is a mutual corporation organized and incorporated under the laws of the State of Illinois. It is the parent corporation of a number of insurance and financial entities that, along with State Farm Mutual, are authorized to provide, and presently provide, insurance and financial services in forty-eight states of the United States, as well as the District of Columbia, and in three provinces in Canada (collectively with State Farm Mutual, the "Companies").

All State Farm insurance and financial products are sold through a force of more than 16,500 exclusive independent agents ("Agents"). These independent Agents are not employees of any of the Companies. Rather, they are independent contractors who exclusively market State Farm insurance products or products sold through their wholly owned State Farm insurance agencies. As a result, the Companies do not exert day-to-day control over the specifics of how the Agents go about selling State Farm insurance products, but require compliance with applicable state and federal law by contract. State

Farm Mutual retains ownership as to customer information, and at the termination of a contract with an Agent, the customer list remains the property of State Farm.

State Farm Mutual requires as a matter of contract and practice that Agents comply with all applicable laws and regulations, including the CAN-SPAM Act, and the regulations implementing such Act once promulgated. The lack of a “safe harbor” for existing customer communication in that Act and the uncertainty of the proposed regulations poses substantial commercial and state insurance regulatory burdens to these Agents in how they might communicate to customers. These Agents are faced with conflicting state and federal standards as they discharge their fiduciary duty to their customers as licensed professionals and risk providing impermissible marketing communications. It is an unintended consequence of the proposed rulemaking that State Farm wishes to explore in these comments how an insurance and financial service Agent discharges his advisory role. In saying this, State Farm urges the Commission to adopt rulemaking which comprehends the kinds of communication which will be necessary and appropriate for the insurance and financial service industry to affect the advisory role necessary for their customers. Accordingly, we would stress in these remarks the service aspect of the Agent communication.

State Farm Mutual supports the efforts of the Congress and the Commission in the ongoing battle against spam. Spam is clogging our customers’ inboxes and our Agents’ inboxes. The reality is that Customers and Agents are becoming more interdependent on web-based communications. The need of legitimate businesses to respond to customer e-mails, or to initiate by email communications to customers who expect this kind of communication, should not be disabled by the proposed rulemaking.

The Congress painted with a broad brush by establishing uniform criteria to regulate electronic commerce. It did, however, grant to the Commission sufficiently broad authority in Section 13 of the Act to modify and interpret key definitions so as not to disable normal business communications. It is our intent to provide the Commission with examples of those kinds of communications which would be normal and appropriate

especially with respect to the business of insurance as well as the financial services industry. In both regards, we stress the importance of ongoing advice and counsel in terms of risk reduction and financial planning for consumers.

State Farm also believes the Act was never intended to interfere with the transmission of legitimate e-commerce. Without sufficient flexibility by the Commission, the externalities of the Act and rule will have the unintended consequence of curtailing legitimate customer communication, while not hindering the illicit spammers operating outside U.S. jurisdictional grounds, who continue to flaunt the spirit and scope of this well intentioned Act.

The Commission, in describing three categories of e-mail and providing certain criteria to evaluate the primary purpose of messages in these categories, is certainly moving in the right direction to facilitate normal customer business communications. The process the Commission has developed while well intentioned misses its mark as it relates to the insurance and financial service industries. The rulemaking misses its mark because we have not sufficiently explained to the Commission how we operate and why the service aspect of servicing insurance and financial products to the changing risks and needs of customers involves both advising and offering new insurance coverage or products to match customer risks and needs. Such advisory function by the agent cannot be accomplished, at least as we read the proposed rules even with the three categories and primary purpose standard set forth in the proposed rulemaking, using electronic commerce.

Messages that are (1) commercial only; (2) commercial and “transactional and relationship”; and (3) commercial with neither elements of commercial nor transactional/relationship messages. These are categories that **do not work in practice** for the professional insurance agent or financial service professional.

State Farm believes that further refinement is both possible for the Commission as well as necessary to avoid disruption of routine and necessary communications.

E-mail that is sent in response to a customer request should be accorded special recognition. Some would use the concept of fulfilling the relationship between a sender and recipient. State Farm would urge a more practical analogy as to why the proposed rulemaking will not work. It is both rude and bad business practice to ignore a communication from a customer. If the customer elects to “click in” as opposed to “call in” to the State Farm agent’s office on an insurance or financial service matter, he or she should not be ignored because the agent cannot “risk the communication” as falling under an impermissible commercial solicitation standard.

Examples of service needs might help explain the dilemma of the agent who is charged with providing information on insurance products and services that would protect the agent’s customer. A policyholder acquires an additional car and confirms his or her intent to do so by e-mail either asking or remaining silent on what insurance products or coverage adjustments he or she may need. The agent is aware of the financial responsibility requirements of the insured in the state. The agent should also be advising *as to the appropriate liability limits to customer, whether the coverage would better be provided by an auto liability policy written in conjunction with an umbrella policy, whether the limits of property damages liability as well as when comprehensive or collision coverage would be appropriate. Is the car a new car or “second hand” car for a new teenage driver in the household.* For the agent, in the event of an added car request, he or she needs to advise the insured regarding financial responsibility law options which would be applicable under state insurance code. The agent, as a professional advisor, should also explain coverage options which would be appropriate to the unique risk situation and financial need of the insured.

In this example of the added car situation, if the agent communication is deemed to be other than transactional, then a range of opt out and commercial duties follow. State Farm believes that responding by phone or letter to a customer after receiving an email would be against reasonable customer expectation.

Another example might help clarify the situation. An agent is aware that the insured has recently married and is also aware that the new spouse is a licensed nurse. If the newly married insured calls the agent inquiring about homeowner's insurance, it would be logical to explain to the customer that State Farm markets a nurse's professional liability endorsement to the homeowner policy. To continue this example, the agent might also advise the caller that State Farm offers through the State Farm Bank competitive rates on a home mortgage. The agent might also link the homeowners insurance coverage to car insurance policies the insured already has with State Farm explaining that the best rate and level of coverage for the insured might be achieved through the purchase of an umbrella policy which provides both personal injury and personal liability coverage.

Insurance and financial products are services products. Agents routinely communicate with customers to explain products and financial needs. In fact, agents are required to advise and communicate to insureds in order to avoid gaps in coverage and to fully inform insureds as to coverage options especially selection rejection of options involving statutorily mandated coverage. Today, professional insurance agents carry errors & omissions coverage to respond to this professional service obligation.

E-mail initiated by the agent of record is often both a transactional and commercial or marketing communication. An agent might drive by an insured's home and notice that his customer is in the midst of a home addition. The agent can call to advise that the Company should be notified of any substantial change in risk that it insures. He or she might more logically and personally remind the customer his or her coverage limits might be inadequate in view of the new home addition. Again part of the message is transactional. Part is commercial. How can the e-mail conversation be limited?

E-mail transaction might be ongoing. A claim submitted by or against an insured is a matter of constant concern to the insured. Electronic communications to the customer and incidental messages associated with product needs would be limited by the Commission's proposed rule.

State Farm believes the “primary purpose” test set forth in Section 316.3 (a) is too narrow. There is a need for some new category which would allow normal communications especially in service focused business relationships.

In fact, we believe the Commission should provide businesses with more certainty by labeling messages with the kind of content we have identified in these examples as not being “commercial.” These labels or exceptions would apply to: (1) e-mail messages where the recipient has agreed to the e-mail; (2) agent to customer and customer to agent communications provided in the context of routine service and product needs being made available or being met on behalf of the customer; and (3) e-mail that is related to a product or service already purchased or requested or related to providing services or products to the customer because of products or services previously purchased.

State Farm believes that communications by a professional insurance agent regarding risk issues and needs to existing customers always have a primary purpose that is not “commercial.” While the Commission may feel constrained to find the statutory definition of “affirmative consent” as a limiting factor in providing this kind of service business exception, we believe that constraint is misguided.

Unlike the *Telephone Consumer Protection Act*, the Congress did not carve out an exception permitting communication with existing customers. While State Farm believes that kind of exception might make commercial and consumer sense, we do recognize that the CAN-SPAM Act did not provide such exception. The Congress faced uncertain electronic commerce boundaries and chose instead to empower the Commission to make the necessary practical delineation between “commercial content” and “transactional/relationship” content of an e-mail message.

”The Commission by regulation pursuant to Section 13 may modify the definition in subparagraph (A) [to] expand or contract the categories of message that are treated as transactional or relationship messages for purposes of this Act...”

State Farm submits that the proposed rule, especially at Section 316.3(b) in detailing such transactional or relationship messages is not a good fit for the insurance business because of the service nature of this business. A product definition approach does relate to updating insurance product or service needs (e.g. reminding the Florida homeowner about the importance of adding flood insurance coverage). Service needs could also involve account management (e.g. reminding the customer that a premium deadline is fast approaching).

Conclusion:

State Farm respectfully urges an expansion of “transactional and relationship” message exceptions which will allow normal customer dialogue in e-mail commerce as to the service fulfillment. We also respectfully urge the primary purpose message exception be expanded as outlined above to allow the agent and State Farm to fulfill normal customer expectations. We look forward to working with the Commission as it issues its proposed rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James R. Tuite', with a stylized flourish at the end.

James R. Tuite
Associate General Counsel